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SUPREME COURT, U. S.

No. 71-1280

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In The

Supreme Court of the United States

October Term, 1971

B. Forman Company, Inc., et. al.,

Petitioners,

v.

Commissioner of Internal Revenue,

Respondent.

PETITION FOR REHEARING OF AN ORDER DENYING A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners request a rehearing of the order denying a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

DENIAL OF CERTIORARI

Certiorari was denied June 19, 1972.

REASONS FOR GRANTING THE REHEARING

I. In Two Decisions Filed the Day Following the Denial of Certiorari in this Case, the Tax Court, a Court of National Jurisdiction, Expressly Rejected the Reasoning of the Court of Appeals for the Second Circuit Below as an Aberration From Settled Law. The Tax Court's Reaffirmation of the View of the Court of Appeals for the Sixth Circuit will Result in the Unequal Application of Section 482 of the Internal Revenue Code to Taxpayers in Different Parts of the Country.

In *Kerry Investment Company*, 58 T. C.____, No. 49, 6/20/72, a case similar to the case at bar, the court held that the Commissioner of Internal Revenue lacked authority under section 482 of the Internal Revenue Code to increase the gross income of the maker of an interest-free loan by a hypothetical interest charge where the proceeds of the loan generated no income for the borrower. In reaffirming the position articulated in *Huber Homes, Inc.*, 55 T. C. 928 (1971), the court expressly repudiated the holding of the Court of Appeals for the Second Circuit below that section 482 could be applied irrespective of whether the proceeds of the loans produced income for the borrower.

In *The Kahler Corporation*, 58 T. C.____, No. 50, 6/20/72, the Tax Court held once again that interest may not be imputed to an interest-free loan under section 482 without a showing that the proceeds of the loan produced income. The Court considered the reasoning of the Court of Appeals for the Second Circuit in the case at bar and rejected it in the following words:

> "With due respect, we are of the opinion that the Second Circuit has incorrectly delineated *both* the purpose of section 482 and the circumstances required before the statute can operate. Hence, we opt to follow the interpretation of the intent and usage of section 482 expressed in previous Tax Court opinions on this issue."

Thus, the Commissioner is wrong in stating that the position of the Tax Court is "not in square conflict with the holding below." (Resp. 14, note 8).

In both *Kerry* and *Kahler* the court traced the origins of established law from the decision of the Court of Appeals for the Sixth Circuit in *Tennessee-Arkansas Gravel Co. v. Commissioner*, 112 F. 2d 508 (6th Cir. 1940) through the decision in *Huber Homes, Inc., supra*. Both *Kerry* and *Kahler* were reviewed by the entire Tax Court with but one dissent. The two decisions indicate clearly the fallacy of the Commissioner's argument

before this Court in his brief in opposition that the law is as yet unsettled. In fact, as the Tax Court pointed out, the law has been settled for over thirty years. The *Tennessee-Arkansas Gravel Co.* holding has been consistently followed by the Tax Court, both before and after the Commissioner's adoption of his most recent regulations under section 482. *E. C. Laster,* 43 B. T. A. 159 (1940), Acq. 1941-1 Cum. Bull. 7, *modified on other grounds,* 128 F. 2d 4 (5th Cir. 1942); *Smith-Bridgman & Co.,* 16 T. C. 287 (1951), Acq. 1951-1 Cum. Bull. 3; *Texsun Supply Corporation,* 17 T. C. 433 (1951), Acq. 1952-1 Cum. Bull. 4; *PPG Industries, Inc.,* 55 T. C. 928 (1970); *Huber Homes, Inc.,* 55 T. C. 598 (1971).

The proscription by the Sixth Circuit against the creation of income where none has been realized by the parties as a result of the transaction in question was clear in 1940 and remains clear to this day, the Commissioner's suggestion to the contrary notwithstanding.

The Tax Court is a court of national jurisdiction and is not bound to follow the Second Circuit's decision in this case except within that Circuit. Its decision to follow the view of the Court of Appeals for the Sixth Circuit instead will result in the inconsistent treatment of taxpayers in different parts of the country. This is well recognized as a ground sufficient to warrant the granting of certiorari by this Court. *Turnbow v. Commissioner,* 368 U. S. 337 (1961).

There is no reason for this Court to await further judicial developments under the Commissioner's present regulations, for the regulations added nothing to the law with respect to the issues in this case. They represented merely *another* attempt by the Commissioner to do the same thing which the courts in *Tennessee-Arkansas* and the other cases cited above had said he could not do under the statute. An improper interpretation of a statute cannot be legitimized by being put in the form of a regulation. Cf. *Lynch v. Tilden Co.,* 265 U. S. 315 (1924). The conflict between the Sixth and Second Circuits is no less real

because one decision pre-dated the regulations.* The Second Circuit apparently regards a conflict to exist since it made no attempt to distinguish *Tennessee-Arkansas* in its opinion below.

The Sixth Circuit and the Tax Court have taken issue with the Second Circuit. The courts have clearly articulated both sides of the issues at bar repeatedly throughout the last thirty years. The Commissioner concedes that they are important ones. The arguments and policies governing this dispute are clear and it is unlikely that additional litigation will contribute to the debate. The issues are ripe for review by this Court.

II. The Commissioner is Relying on the Decision of the Court of Appeals for the Second Circuit Below to Attempt to Expand his Authority Under Section 482 Even Further. This Will Cause Unnecessary and Wasteful Litigation Unless This Court Resolves these Issues Now.

In Internal Revenue Bulletin 1972-18, May 1, 1972, the Commissioner announced the withdrawal of his long-standing acquiescences in *The Friedlander Corp.*, 25 T. C. 70 (1955); *Polak's Frutal Works, Inc.*, 21 T. C. 953 (1954); and *Seminole Flavor Co.*, 4 T. C. 1215 (1945). Each of these cases denied his authority to shift hypothetical income among related groups in slightly different circumstances from those in the present case. Commentators have noted that the withdrawals of acquiescences by the Commissioner were in apparent reliance on the Second Circuit's decision in this case. See, e. g., Research Institute of America Tax Coordinator, Checklist 1972-11, Section 1, page 1 (May 25, 1972).

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*That the Commissioner himself may regard the conflict to exist can be seen in his failure to appeal the Tax Court's decision in *Huber Homes, Inc., supra.* The appeal would have had to have been taken to the Sixth Circuit.

This change in the Commissioner's position indicates that, contrary to his brief in opposition, he is unwilling to "await further developments in the Courts of Appeals" before continuing his attempted expansion of the scope of his authority under section 482. (Resp. page 15). The Commissioner's present course of action, absent timely intervention by this Court, will unnecessarily increase litigation and its consequent expense to both taxpayers and the Government. The Commissioner should not be allowed to build on the decision of the Second Circuit before the conflict with the Sixth Circuit is settled by this Court.

CONCLUSION

For these reasons, the petition for rehearing should be granted and a writ of certiorari should be issued to review the decision of the court below.

Respectfully submitted,

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July , 1972

I, Peter L. Faber, counsel for petitioners hereby certify that this petition is presented in good faith and not for delay, and that it is confined to intervening grounds of substantial or controlling effect.

July 11, 1972

/s/ Peter L. Faber
Peter L. Faber